Case No. 06-3300

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA	)	Appeal from the United
	)	States District Court
Plaintiff – Appellee	)	for the Eastern District
	)	of Wisconsin
	)	
	)	
v.	)	No. 04 CR 235
	)	
	)	Hon. William C. Griesbach
STEVEN J. PARR	)	United States District
	)	Judge, Presiding
Defendant – Appellant	)	

BRIEF FOR DEFENDANT-APPELLANT STEVEN J. PARR

Abner J. Mikva, Attorney of Record
H. Melissa Mather
Connie J. Cannon (Ill. S. Ct. Rule 711, License # 2006LS00703)
Edwin F. Mandel Legal Aid Clinic
The University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637-2786
(773) 702-9611
Attorneys for Defendant-Appellant

Oral Argument Requested

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 06-3300

Short Caption: United States v. Steven J. Parr

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Circuit Rule 26.1 and Fed. Rule App. P. 26.1. Each attorney is asked to complete and file a Disclosure Statement with the Clerk of the Court as soon as possible after the appeal is docketed in this Court. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by the Fed. Rule App. P. 26.1 by completing item #3): Steven J. Parr

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or who are expected to appear for the party in this Court:
University of Chicago Law School: Professor Abner J. Mikva
University of Chicago Law School: H. Melissa Mather
University of Chicago Law School: Connie J. Cannon
Kostich LeBell Dobroski & Morgan LLC: Robert G LeBell
Federal Defender Services of Wisconsin Inc: Richard A. Coad
Federal Defender Services of Wisconsin Inc: Thomas A. Phillip

(3) If the party or amicus is a corporation:
i) Identify all its parent corporation, if any; and
ii) List any publicly held company that owns 10% or more of the party's or amicus's stock:
N/A

Attorney's Signature: Date: 01/16/07
Attorney's Printed Name: Abner J. Mikva
Address: 6020 South University Avenue, Chicago, Illinois, 60637
Phone Number: (773)702-9611
Fax Number: (773)834-0961
E-Mail Address: amikva@law.uchicago.edu

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), Defendant-Appellant Steven J. Parr respectfully requests oral argument. Defendant-Appellant believes that oral argument will assist the Court in deciding this appeal, which presents issue that are closely intertwined with the substantial record developed in the district court below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

This is a direct appeal from a final judgment entered by the United States District Court for the Eastern District of Wisconsin. On April 27, 2006, following a jury trial, Defendant-Appellant Steven Parr was convicted on one count of threatening to use a weapon of mass destruction against a facility owned or leased by the United States government, in violation of 18 U.S.C. § 2332a(a)(3). The District Court sentenced Parr on August 16, 2006, and entered Final Judgment on August 18, 2006. On August 25, 2006, Parr filed a timely Notice of Appeal.

Original jurisdiction of this matter was proper under 18 U.S.C. § 3231, which provides federal district courts with "original jurisdiction . . . of all offenses against the laws of the Untied States." Appellate jurisdiction is proper under 18 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

I) Whether Parr's conviction violates the First Amendment because his alleged statements were not "true threats."

II) Whether the District Court erred by referring to Parr, in front of the jury, as "Mr. McVeigh".

III) Whether the District Court erred by admitting extensive evidence related to Parr's views of Timothy McVeigh and the Unabomber, and alleged prior statements and acts related to bombs and bomb-making.

IV) Whether the cumulative effect of irrelevant and unduly prejudicial evidence admitted at trial, along with the District Court's specific reference to Parr as "Mr. McVeigh" deprived Parr of his right to a fair trial.

V) Whether the district court improperly calculated Parr's offense level at sentencing by applying enhancements for obstruction of justice and involving a crime of terrorism.

VI) Whether Parr's sentence is unconstitutional because it is based, in part, on facts not found by a jury beyond a reasonable doubt.

STATEMENT OF THE CASE

On October 5, 2004, a grand jury indicted Parr for one count of threatening to use a weapon of mass destruction against the Reuss Federal Plaza in Milwaukee, Wisconsin, in violation of 18 U.S.C. §2332a(a)(3). A jury trial was held under Judge William G. Griesbach in the United States District Court for the Eastern District of Wisconsin from April 24 to April 27, 2005. On April 27, 2004, the jury returned a verdict of guilty. Final Judgment and Sentencing were entered on August 18, 2006, with Parr ordered to serve 120 months in prison, followed by 60 months of supervised release, and to pay a $2,000 fine. Parr filed a timely notice of appeal on August 25, 2006.

STATEMENT OF FACTS

Background

In August and September 2004, Parr was serving a two-year sentence at Oshkosh Correctional Institution on a state drug conviction. In August 2004, Parr was transferred to a different cell block in anticipation of his release in 30 days. While in this new cell block, Parr became cell mates with John Schultz.

On August 23rd, 2004, John Schultz sent letters to the FBI and Secret Service alleging that "somebody is making plans to blow up the federal building." R. 1. After receiving these letters, Agent Molina of the FBI and Agent Cheung from the Department of Homeland Security went to Oshkosh to interview Schultz. Following this interview, Schultz agreed to wear a wire, and attempt to have Parr make threats against the Reuss Federal Building in Milwaukee on tape.

Parr was scheduled to be released to a halfway house on September 21, 2004. On September 20, Special Agent Hammen came to Oshkosh and fitted Schultz with a recording device. Agent Hammen instructed Schultz to try to get Parr to talk about his alleged plan to blow up the Reuss Federal Building.

That evening, Schultz returned to his cell fitted with the device and recorded four hours of conversation with Parr. Throughout the conversation, Schultz repeatedly pressed Parr to discuss how to make different types of explosives. Parr told Schultz that he had experience with chemicals and had blown things up before. For example, Parr told Schultz that he had blown things up in a lab-setting, with a blast shield, Schultz Tr.

at 34, and that once he had blown up an old icehouse after a friend who owned the property asked him to. *Id*. at 47. At one point, Parr told Schultz that he had set a fire in a house where an ex-girlfriend was living, but that he had deliberately set it in the back of the house, so that everyone inside would have plenty of time to get out without being hurt. *Id*. at 97. Several times during the conversation, Schultz made comments about Parr blowing up the Federal Building in Milwaukee, such as "You don't give a fuck about hurtin' anybody when you do the federal building." *Id*. at 73. Parr said that he has never bombed a building with people in it, because in his words, "I didn't want to hurt noone [sic]." *Id*. at 73. After Schultz repeatedly asked Parr how he might go about blowing up the Federal Building, Parr told Schultz that he would get a pair of brown pants at Farm and Fleet, "wear a silly . . . little name tag patch to make it look official," walk in and back out of the building, then leave. *Id*. at 91-92. When Schultz pressed Parr to give him a specific time-frame for blowing up the building, so that Schultz could make money by writing a book about being Parr's cell-mate, Parr said that there were lots of things he wanted to do first, like "pumpin' out a couple of kids." *Id*. at 113. Parr then suggested "Well, I'm 40 now. Maybe 50. Maybe it'll be my 50th birthday present." *Id*. at 94. Parr also stated that when he got out of jail he wanted to do smaller things, "not smaller to hurt people, smaller as in practicing and refining" and that he would only bomb buildings if "somebody wants me to bring it down." *Id*. at 104. At various points in the conversation, Parr appears to leave the room, and Schultz can be heard talking directly to the agents, saying things like "Looks like a home run so far" and "his pill's gonna kick in and I'm just gonna get him talkin'." *Id*. at 53-54.

The tape also records Parr and Schultz discussing their grievances against the government. For example, Parr says the states are just "the messenger" for the Federal Government, and that his attitude has "gone downhill these last few years" since the Government took away his son.[1] *Id*. at 98-99.

Arrest

On September 21, 2004, Parr was released as anticipated to a halfway house. The following day, Parr was taken back into state custody and held at the Rock County Jail. On September 29, 2004, Agent Hammen and another FBI agent went to Rock County Jail to interview and arrest Parr.

Both Agent Hammen and Parr testified at trial concerning what happened during the interview. According to Agent Hammen, after Parr signed an Advice of Rights, the agents told Parr that he had been arrested for threatening to blow up the Reuss Federal Building. Tr. 1 at 87-88. Parr said he had seen Reuss Plaza "when he was downtown in Milwaukee to see a movie," but "denied having made [the] statements [on the tape]" and said it was actually Schultz who wanted to blow something up. *Id*. at 103-104. Agent Hammen said that he "gave [Parr] the opportunity to say that he may have been joking about this . . . [and] . . . [h]e never indicated that at all." *Id*. at 107.

[1] Parr was living with Gina Castro in 1991 when she gave birth to a son, who Parr believed to be his own. Parr was with Castro throughout pregnancy and helped raise the child after birth. Parr maintained custody of the child after Castro moved out in 1992, until Castro filed a paternity suit and tests revealed that the child was not Parr's biological son. Based on the result, Parr's custody rights were taken away and custody awarded to Castro and another man. R. 39 at App. C.

Parr testified at trial that when the FBI agents came to interview him, he already knew that Schultz had "ratted" him out and got him on tape, but when Parr asked about the tape, the agents said that they did not know what Parr was talking about. Tr. 3. at 496-497. The agents said "something very close to but if this is just a big misunderstanding, let's discuss it." *Id*. According to Parr, this statement led him to believe that "they'll find out it was a hoax, and let me go home." *Id*. At that point, Parr had been in jail for 8 days without knowing why. In the beginning, it was Parr's intent to communicate to Agent Hammen that "this was not real," but "[a] ways into the conversation it became apparent to me that this. . . is something pretty serious going on here. And I'm not going home." *Id*. at 497. At that point Parr started denying everything. *Id*. at 530. Parr said that he never told the agents he was joking, because "They didn't ask until the end. And by that time I'd – to use that term generically, lawyered up." *Id*.

At the end of the interview, Agents Hammen and Molina placed Parr under arrest.

Trial

Parr was tried by jury in Milwaukee. The Government spent most of the first day and a half of trial calling Parr's ex-girlfriends and former neighbors to testify about Parr's alleged "prior bad acts," including his interest in chemistry experiments, how he talked about making bombs, and his opinions on Timothy McVeigh and the Unabomber. The Government also called Agent Hammen to testify about the

investigation and describe for the jury the contents of various books and papers allegedly belonging to Parr. Among these were notes Parr had written saying things like, "Gov. makes me angry," and the Anarchist Cookbook.

The Government also called Agent Daniel Hickey, an FBI Lab Examiner, as an expert witness in explosives. Agent Hickey went through the Schultz-Parr transcript with the jury and testified that Parr's statements on the recording demonstrated that he "understand[s] the basic principles of explosives" but "does not have the chemistry right." *Id*. at 372. Agent Hickey further testified that in his expert opinion, Parr would be capable of producing a vehicle bomb "after some practice." *Id*. at 362.

While the Government did not call Schultz, Parr's former cellmate, Parr did. On direct, Schultz admitted that at the time he wrote the FBI, he had not yet been cleared of "Chapter 980 status", under which he could be indefinitely committed as a repeat sex offender. Tr. 2 at 258-260, 263. Schultz also testified that he has a Bachelor of Science degree with a minor in chemistry, and that while he had stated in his letters to the FBI and the Secret Service that Parr "knows way more than I do," that he would correct Parr's chemistry as "kind of a joke," and to "mess" with him. *Id*. at 264-65, 269-270. Schultz further admitted that at some point, he asked the state court in Kenosha for a reduction in his sentence based on his efforts to identify Parr as a terrorist, but insisted that this expectation of benefit in exchange for his testimony was only fleeting. *Id*. at 277-280.

Parr also testified on his own behalf. Specifically, Parr admitted to having experimented with pipe bombs and gun powder, and said he loves fireworks. Tr. 3 at

474, 481. Parr said that his conversations with Schultz began when Schultz "said something about wanting to get the State Capitol." *Id*. at 487. According to Parr, Schultz was the one who initiated most of the conversations. *Id*. at 489. Parr stated that he often tries to get attention by bragging and talking about controversial subjects. *Id*. at 475-477. He said he talked with Schultz about explosives because "that's what he wanted to talk about." *Id*. at 491. "If he would have said let's talk about semis, I would have ranted and raved about – talking about semis." *Id*. at 492. Parr and Schultz's conversations progressed to discussing the Federal Building when Schultz kept asking Parr "how would you do it." *Id*. The night of September 20th, Parr had no TV or entertainment and was excited about going home. In his words: "I'm wired. I'm hyped up. I've got nothing to do. . . .It's a night's entertainment for me. It's not a real conversation. . . . None of this is real." *Id*. at 493. Parr testified that he did not intend any of his statements to be a threat, that it "wasn't real to begin with". He did not think Schultz was going to believe him, and does not think Schultz ever did believe him. *Id*. at 495.

In conclusion, Agent Hammen testified on rebuttal, reemphasizing that he claimed to have provided Parr with an opportunity during the post-arrest interview to say that Parr's statements regarding the Federal Building were just a joke, but that Parr "never brought it up." *Id*. at 535.

During deliberations, the jury asked the Judge to see copies of some of the books Parr had owned, among them THE ANARCHIST COOKBOOK. The Court allowed the book to go to the jury room. Tr. 4 at 640-41.

Sentencing

Parr's PSR recommended a guideline range of 360 months to life, based on a base offense level of 24 (according to Guideline § 2K1.4), and enhancements for perjury and "involving a crime of terrorism." The District Court accepted both enhancements, despite the court's explicit finding that the threat of which Parr was convicted "was not calculated to influence or affect the conduct of government." R. 187 at 31. The District Court also determined, however, that Parr's crime did not fit within the "heartland" of the guidelines, noting specifically that Parr's threat was not imminent, lessening the immediate need to protect the public. R. 187 at 73. Based on this finding, the District Court sentenced Parr to 120 months in prison with 60 months supervised release, and a $2,000 fine.

SUMMARY OF THE ARGUMENT

Parr's conviction violates the First Amendment because Parr's statements were not true threats within the proper definition of the term. Parr's statements were made to his cell-mate, the night before Parr was to be released from prison, and despite the cell-mate's repeated attempts to force Parr into saying something specific, contained no explicit expression of an immediate intent to bomb the Reuss Federal Building. Under these circumstances, no reasonable person would have foreseen that Parr's statements would be perceived as serious threats against federal property.

Under this Court's objective standard for judging true threats, Parr's trial should have focused on the question of whether a reasonable person in Parr's position would have foreseen that his statements would be perceived as serious threats. Instead, the Government permeated the trial with irrelevant and prejudicial testimony from Parr's ex-girlfriends and neighbors, about Parr's interest in explosives and alleged admiration for Timothy McVeigh.

The testimony was so prejudicial and convincing that as early as the first day of trial the District Court judge referred to Parr as "Mr. McVeigh" in front of the jury.

The cumulative effect of admitting the irrelevant and prejudicial evidence, plus the judge's prejudicial comment was to deny Parr his constitutional right to a fair trial.

At sentencing, the trial judge enhanced Parr's sentence based for obstruction of justice and involving a crime of terrorism. Both enhancements were unwarranted because there was not enough inconsistency in Parr's testimony for the District Court to

find that Parr willfully perjured himself at trial, and because Parr's offense did not fit within the guideline's definition of "involved a crime of terrorism".

In addition, the Supreme Court's recent decision in *Cunningham v. California*, ___U.S. ___, 127 S. Ct. 856, 863-64 (2007) reaffirms the Court's commitment to protecting defendants from sentences enhanced based on findings not made by a jury beyond a reasonable doubt, and demonstrates that Parr's sentence violates his Constitutional right to a jury trial.

ARGUMENT

I. Parr's Conviction Violates the First Amendment Because Parr's Statements were not true threats.

a. Whether Parr's statements fall within the scope of First Amendment protection is an issue of law which this Court should review *de novo*.

The First Amendment to the United States Constitution states that "Congress shall make no law . . .abridging the freedom of speech" U.S. CONST. amend. I. Generally, speech is not punishable as a crime. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). There are, however, some narrowly-construed exceptions to this general rule. Speech which falls under the definition of a "true threat" may be punished without violating the First Amendment. *See Virginia v. Black*, 538 U.S. 343, 359 (2003); *R.A.V. v. St. Paul*, 505 U.S. 377 (1991). Prohibiting true threats affects two important purposes: (1) protecting people from the possibility that the threatened violence will occur; and (2) protecting individuals from the intimidation, disruption, and expense that follow a serious threat. *Id. at 388.* Because these effects occur whether or not the speaker intended to commit the threatened act, intent and capability to follow through on the threat are generally irrelevant in a true threat prosecution. *See United States v. Khorrami* 895 F.2d 1186, 1192 (7th Cir. 1990); *United States v. Fuller*, 387 F.3d 643, 647 (7th Cir. 2004) ("Disruptions, inconveniences, and substantial costs occur regardless of whether a threat was subjectively intended to be carried out."); *Rogers v. United States*, 422 U.S. 35, 46-47 (1975) (Marshall J., concurring) ("[T]hreats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out.").

Categories of unprotected speech must be construed narrowly in order to avoid treading on protected speech, while also affecting the purpose of the prohibition. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002) (holding that the Constitution protects virtual child pornography because the purpose of government regulation of this activity is to protect children, and children are not harmed in virtual child pornography); *Brandenberg*, 395 U.S. at 447 (holding that incitement to illegal action may only be prohibited where the speech is likely to create imminent lawless action because the purpose of the prohibition is to prevent the illegal action from occurring); *Watts*, 394 U.S. 705, 708 (1969) (narrowly construing the category of unprotected threats, holding that only true threats may be punished, as opposed to political hyperbole or joke). Insofar as Parr's statements were not true threats, his statements constitute protected speech and his conviction violates the First Amendment.

This Court defines a true threat as a statement made "in the context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm." *Khorrami*, 895 F.2d at 1193 . Thus, the crux of a true threat is whether a reasonable speaker would foresee that his statements would be perceived as serious. It is not necessary that the defendant actually intended to commit the threatened act, or that he was capable of doing so. *Id.*; *United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986).

While the question of whether a statement is a true threat is a question of fact left to the jury, *Khorrami*, 895 F.2d at 1192, the proper scope and definition of true threat is an

issue of law which the appellate court should review *de novo*. *See Planned Parenthood of the Colombia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002). The Supreme Court has also stated that in cases implicating First Amendment rights, "reviewing courts have an obligation to conduct an "independent examination of **the whole record**, in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (internal quotes omitted) (emphasis added). In conducting this review, appellate courts should "be vigilant for errors of law that 'may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" *New York v. Operation Rescue Nat'l*, 273 F.3d 184, 193 (2d Cir. 2001) (quoting *Bose Corp.* 466 U.S. at 501); *see also Dennis v. United States*, 341 U.S. 494, 511-15 (1951) (finding that the question of how the First Amendment applies in interpreting a statute is a question for the court, not for the jury).

b. Parr's statements were not true threats because they were not threats.

Parr's statements were not true threats within the meaning of the First Amendment because they were not even threats. The indictment alleged that between August 17th, 2004 and September 20th, 2004, Parr made statements threatening to use a weapon of mass destruction against a government facility. At trial, the Government named this building as the Reuss Federal Building in Milwaukee, Wisconsin. However, the only evidence the government offered to show what Parr said about the Reuss Federal

Building consisted of 1) the September 20th, 2004 recording of Parr's conversation with Schultz, and 2) Schultz's own testimony regarding what Parr had said to him before the tape recording.

Specifically, Schultz testified that during his tenure as Parr's cellmate, he and Parr talked several times about chemistry and explosives. Tr. 2 at 268-277. According to Schultz, Parr brought up the topic of bomb-making when Parr claimed to have tinnitus in an ear from detonating a bomb. Tr. 2 at 269. Schultz testified that Parr had told him that "he had manufactured and constructed bombs before of many different types" and "he had exploded and detonated bombs in the past." *Id*. at 274. Schultz further testified that when the FBI agents fitted him with a recording device, they instructed him to "get [Parr] to repeat the things that I stated in my letter to them." *Id*. at 296. However, when asked specifically what Parr had first said about blowing up the Federal Building, Schultz only answered "a lot of things." Tr. 2 at 306. Later, after being reminded, Schultz testified that Parr had said that the Reuss Federal Building was "the perfect target." *Id*. at 310. Schultz never testified that Parr explicitly said he was going to bomb the Reuss Federal Building. *See generally id*. at 278-303.

Aside from Schultz's testimony, the only evidence the Government offered that Parr actually threatened to blow up the Reuss Federal Building was the September 20th recording of Parr's conversation with Schultz. Even during this conversation, Parr never explicitly stated that he was going to blow up the Reuss Federal Building.

Throughout the conversation, **it is Schultz, not Parr**, who continuously brings up Parr taking action against the Federal Building. Schultz makes numerous statements

such as "This is the same bitch that you said you were going to blow up the building to?" Schultz Tr. at 16, "You don't give a fuck about hurtin' anybody when you do the federal building." *Id*. at 73, and "I still think there's better targets than the federal building in Milwaukee brother, let me tell ya." *Id*. at 74. Parr's responses to Schultz are at most ambiguous – at times he says "yes" or "mm mh," while at other times he appears undecided about the issue. *Id*. at 74-75. After Schultz says "But I get the feeling they're gonna fuck with you one time too much and you're gonna let em have it." Parr only responds "Could very well be. I wouldn't put it past me." *Id*. at 98.

Parr's statement that "I think it would make a wonderful statement," without anything more explicit, can only be interpreted as an endorsement of violent action, which is not the same as true threat. *Id*. at 89; *see United States v. Lincoln*, 403 F.3d 703, 707 (9th Cir. 2004) (finding that letter to President Bush saying "You will die too George W Bush real Soon" and "Long live BIN LADEN" were not sufficient to convict defendant for threatening the life of the President because the statements were endorsements of violence but not true threats).

Taken in context of the whole conversation, it is also apparent that much of the conversation referring to the Reuss Federal Building had nothing to do with making threats, but was merely a continuation of Parr and Schultz's discussion about explosives:

> CW: Would that be enough to fuckin' blow that fuckin' federal building up?
>
> Parr: If you put it in the right position I suppose it would. The position is key. You either gotta confine the space.

CW: Or make it bigger because it's open space.

Parr: Right.

Schultz Tr. at 86-87.

Because Parr himself never explicitly said he was going to blow up the building, his statements cannot be considered "threats" in the most generic sense of that term, much less meet the stringent standards of the narrowly-construed true threat exception to the First Amendment's general prohibition on punishing speech. *See United States v. Frazer*, 391 F.3d 866,869 (7th Cir. 2004) (defining "threat" as "an expression of intention to inflict evil, injury, or damage").

c. Parr's statements were not true threats because no reasonable speaker would have foreseen that the statements would be perceived as serious in the context in which they were made.

Additionally, Parr's statements were not true threats because no reasonable speaker in Parr's position would believe that the statements would be interpreted by the hearer – in this case a prison cell-mate – as serious. *See Khorrami,* 895 F.2d at 1193 (emphasizing the importance of context in judging whether a statement is true threat).

Here, the allegedly threatening statements were made at Oshkosh Correctional Institute, during a conversation between two cellmates. While Schultz himself, after repeated prodding and suggestion by the Government, testified that he thought Parr's statements expressing animosity toward the Government were "different from that run-of-the-mill," that he had heard from other cell-mates, Schultz never provided any direct testimony as to what Parr said that constituted a threat to the Federal Building, other

than a statement that it "would make a great target." Tr. 2 at 310. Surely, if discussions between cell-mates in prison regarding negative feelings towards the government were punishable as terrorism, it is hard to imagine that the Government could ever release anyone from jail. Adding in the fact that two cell-mates embellished that discussion with how one or the other of them might get back at the Government, in some far-off, indefinite, and generally ambiguous manner, does nothing to turn this discussion into something punishable as a crime.

Indeed, Parr's statements were more properly understood as joke and political hyperbole than "true threat." Parr testified that he understood his conversation with Schultz to be "a night's entertainment" and "not a real conversation," in part because the conversation occurred on the night before Parr was going to go home, when his television and reading material had been packed for release. Tr. 3 at 493. Schultz laughs numerous times during the conversation, suggesting that both inmates considered their conversation to be nothing more than entertainment. *See* e.g. Schultz Tr. at 111-12. Parr testified that he thought Schultz believed the conversation was a joke because Schultz was laughing so much. Tr. 3 at 501. Schultz also testified that his early conversations with Parr were "kind of a joke. It was kind of funny to watch his reaction when I corrected him on his chemistry stuff." Tr. 2 at 269. Schultz admitted that in most of the conversations he had with Parr about chemistry and bomb-making, he was "trying to have a little fun" and "messing with him a little bit. It was just fun and games." Tr. 2 at 270. When asked to explain what changed, and turned this particular conversation, on

the night before Parr's release, into a threatening one, Schultz only said "this was different. It just had a different feel." Tr. 2 at 309.

Additionally, Parr and Schultz's discussion of chemicals and bomb-making clearly occurred in the context of discussing both men's frustration at how they felt the Government had mistreated them. In fact, Schultz testified that Parr first expressed his alleged threat against the Federal Building in the context of explaining that he was angry with the Government:

> Mr. Biskupic: And can you tell us about the context of what you were talking about when Parr first brought up his desire to blow up a building.[. . .]
>
> Mr. Schultz: He was mad about – I can't remember exactly what it was. He was upset about his convictions. He was upset about losing his kid. He felt the Government took his – had something to do with taking his kid from him. I'm not exactly sure in specific.

Tr. 3 at 311.

Parr's anger and frustration toward the Federal Government came out several times during the September 20th conversation. Parr says that his "attitude has really gone down hill these last few years. Especially after my son. That, that was just the straw that broke the camel's back." Schultz Tr. at 98. Schultz tells Parr that he should "get the Wisconsin capitol building brother. . . . They're the ones that locked you up. They're the ones that took your son away. That's the one you should get right there." *Id*. at 99. Parr then says that the states are just "the messenger" for the federal government:

CW: So you're sayin' the feds are really to blame for all this bullshit.

Parr: Yep. The states are subservient to the feds.

Id.

It is clearly established law that the First Amendment protects political statements, even when they include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts*, 394 U.S. at 708. Insofar as Parr's statements were merely an emphatic or disturbing way of expressing his grievances against the government, his statements cannot be interpreted as true threats and are protected under the First Amendment.

d. Parr's statements were not true threats because they were not communicated with the intent to intimidate a victim.

Parr's statements were not true threats because they were not communicated to anyone who might be a victim of the alleged threat. Schultz was not a victim of the alleged threat because he did not work in the Federal Building, or have any connection with it. Nor did the Government present any evidence that Parr ever intended for his statements to be communicated to anyone who might be connected in any way with the Federal Building.

In *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997), the Sixth Circuit defined threats as "tools that are employed when one wishes to have some effect, or achieve some goal, through intimidation." In *Alkhabaz,* the Sixth Circuit affirmed dismissal of an indictment for transferring threatening communications in interstate

commerce, finding that emails written by the defendant to a friend that expressed interest in sexual violence were not "true threats". *Alkhabaz*, 104 F.3d at 1496. In reaching this conclusion, the Sixth Circuit focused on the fact that the Government had presented no evidence that the defendant intended to intimidate anyone, meaning that punishing this type of speech would not serve the purpose behind the "true threat" doctrine: to protect the hearer's sense of safety and well-being. *Id*. Indeed, the communications between the defendant and his friend in *Alkhabaz* were not threats at all because no reasonable person would perceive these statements as trying to effect change through intimidation. *Id*. Instead, the defendant and his friend sent the messages in an attempt to foster friendship based on shared sexual fantasies. *Id*.*; see also United States v. Fenton*, 30 F. Supp. 2d 520 (W.D. Penn. 1998) (applying *Alkhabaz* decision in granting motion for judgment of acquittal).

Like *Alkhabaz*, criminalizing Parr's statements would not affect the purpose of the prohibition on true threats because Parr clearly had no intent to threaten or intimidate anyone. The District Court actually found as much when, in the context of Parr's sentencing hearing, the court stated that having heard the evidence, the court was convinced that Parr's statements were "not calculated to influence or affect the conduct of government," R. 187 at 31. Similarly, Parr testified that he didn't think anyone would get hurt because "it wasn't a real plan" and he did not "want to hurt anyone. I don't want to hurt any property. . . . It was not intended to scare." Tr. 3 at 499.

Because Parr's statements were not communicated to anyone in an attempt to intimidate or scare, the statements do not fall within "true threat" doctrine, and cannot be punished without violating the First Amendment.

e. Parr's statements were not true threats because they did not express an imminent intention to bomb any building.

Alternatively, even if Parr's statements could have been interpreted as threatening, these statements were not true threats because they did not express an imminent intention to bomb any building. In order for the prohibition on true threats to be narrowly tailored, any statement constituting a "true threat" must be imminent. Imminence is a bedrock principle of First Amendment law. *See, e.g., Brandenburg*, 395 U.S. at 447 ("[T]he constitutional guarantees of free speech and free press do not permit [the Government] to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.")

In *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), the Second Circuit interpreted the Supreme Court's decision in *Watts* as limiting the definition of true threats only to "unequivocal, unconditional and specific expression[s] of intention immediately to inflict injury" *Id*. at 1027 (emphasis added). In that case, the Second Circuit asked whether Kelner's threats to Yasser Arafat in a televised interview "unambiguously constituted an immediate threat" and conveyed "a gravity of purpose and imminent prospect of execution." *Id*. at 1027-8. The court affirmed Kelner's conviction because the statements were unequivocal: "We are planning to assassinate Mr. Arafat", and

immediate: "We have people who have been trained and *who are out now*." *Id*. at 1028 (emphasis in original).

The polar opposite of *Kelner*, Parr's statements were neither immediate nor unequivocal. Throughout the conversation, despite repeated nagging from Schultz, Parr refuses to say that he will bomb any building at any definite time. For example, toward the end of the conversation, Schultz starts joking about writing a book about Parr. *Id*. at 93-94, 103-04. Schultz makes Parr promise that Parr will give Schultz an interview, and presses Parr to blow up the building soon, because Schultz needs money from the book right away. *Id*. at 94. Parr clearly tells Schultz:

> Parr: Oh, it, it'll be a number of years before I do it.
>
> CW: How long?
>
> Parr: Well, I'm 40 now. Maybe 50. Maybe it'll be my 50th birthday present.
>
> CW: 50th birthday present. Fuck it. Fuck it, that's too long for me to wait.

Id.

Parr also says "There's a few things I wanna get done first. Like pumpin' out a couple of kids." *Id*. at 113. True threat doctrine cannot reasonably be interpreted to include such ambiguous statements. *See Watts*, 394 U.S. at 708 (reversing conviction and rendering judgment of acquittal for alleged threats made in an "expressly conditional" manner, and which the listeners responded to with laughter).

Indeed, a fair review of the entire September 20th transcript reveals that the more Schultz presses Parr for a promise that he will bomb Reuss Plaza, and a promise that Schultz will get an interview, the more clearly Parr states that he is ***not*** planning to

bomb a building anytime soon, if ever. For example, in response to Schultz's statements that "So you're basically gonna be out of commission for a little while." Parr responds: "I'm just gonna stick with small shit for awhile." Schultz Tr. at 95. Parr also tries to make clear to Schultz that he is not going to hurt people or blow up any buildings:

> CW: . . . It's more like you say you're gonna do somethin' smaller first.
>
> Parr: Not, not smaller to hurt people, smaller as in practicing and refining.
>
> CW: Mn mh.
>
> Parr: My techniques.
>
> CW: No buildings are gonna get it or nothing though. No parole buildings (laughs)
>
> Parr: Not intentionally, no. If it's a building, it's because somebody wants me to bring it down. . .

Id. at 104.

Because true threats are unprotected only so far as they would reasonably engender fear in the victim, prohibiting non-imminent statements such as Parr's does not affect the purpose of the prohibition, and is against the First Amendment.

II. The District Court Committed Plain Error When it Referred to Parr as "Mr. McVeigh" in Front of the Jury.

The District court committed plain error by referring to Parr as "Mr. McVeigh" during trial. Judicial comments in the presence of the jury are subject to special scrutiny because "the influence of the trial judge is necessarily and properly of great weight, and

that his lightest word or intimation is received with deference, and may prove controlling." *United States v. Dellinger*, 472 F.2d 340, 386 (7th Cir. 1972) (quoting *United States v. Starr*, 153 U.S. 614, 626 (1984)).

The comment occurred in the following context, during Parr's cross-examination of the Government's first witness, Ms. Louise Olson, an ex-girlfriend of Parr's:

> Mr. LeBell: So the only reason you know that supposedly this is bomb making materials is because he told you that?
>
> The Court: I'm going to interrupt here, because I'm worried I may have confused the witness. You're asking her how she knows things. And if she knows of something **other than from Mr. McVeigh** (sic), she can say that.
>
> Mr. Biskupic: **Parr**.
>
> The Court: I mean Parr. I'm sorry.
>
> Mr. Biskupic: Could we be heard at side-bar?
>
> The Court: Yes.
>
> (Whereupon a side-bar conference was held off the record.)

Tr. 1 at 27-28 (emphasis added).

Due Process requires that a defendant be given a "fair trial in a fair tribunal," which includes the right to a "fair and impartial judge." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam). By referring to Parr as "Mr. McVeigh," the trial judge created unfair bias and destroyed "that atmosphere of austerity which should especially dominate a criminal trial." *Offutt v. United States*, 348

U.S. 11, 17 (1954). This mistake resulted in the judge, early in the trial, suggesting the one mental connection that was most destructive of Parr's chance for a fair trial.

The Oklahoma City bombing was an infamous event that killed 168 people, and shocked the entire nation. Any comment by the judge connecting Parr to McVeigh was clearly "of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." *Dellinger,* 472 F.2d at 386 (quoting *Quercia v. United States*, 289 U.S. 466, 472 (1933)).

This comment occurred during the first day of trial, during cross-examination of the very first witness. Accordingly, this comment colored the entire proceeding with the idea that the judge himself viewed Parr as equal to, or comparable with, Timothy McVeigh. *See Rush v. Smith*, 56 F.3d 918 (8th Cir. 1995) (holding that even one comment appealing to bias or prejudice "may be sufficient to destroy the integrity of the entire proceeding").

Cases where judicial bias is manifested are not subject to the harmless error rule. *See Bracy v. Schomig*, 286 F.3d 406, 414 (7th Cir. 2002) (holding that in cases of judicial bias it does not matter if the jury would have convicted the defendant anyway)**;** *Cartalino v. Washington,* 122 F.3d 8, 9 (7th Cir. 1997) (holding that the constitutional right to an impartial judge is not subject to the harmless error rule); *see also Hunter v. United States*, 62 F.2d 217, 220 (5th Cir. 1932) (finding that fact that a district judge did not intend to be unfair was "beside the question").

Here, the trial judge never instructed the jury to ignore the comment, either directly after it was made or through a curative instruction. Instead, the judge simply moved on as if nothing had happened. *See Dellinger,* 472 F.2d at 386 (finding that curative instructions are inadequate when the comment was likely to preclude a fair evaluation of the evidence). In *United States v. Van Dyke*, 14 F.3d 415 (8th Cir. 1994), the Eighth Circuit held that the defendant was entitled to a new trial when during the defendant's testimony the trial judge said "I sort of drifted away. What was the question?". The court found that this comment "could have given the jury an early impression (even if incorrect) that the trial judge was not interested" in what the defendant had to say. Similarly, by calling Parr "Mr. McVeigh," the trial judge gave the jury the impression that, in the eyes of the trial judge, Parr was the same or comparable to Timothy McVeigh.

In numerous cases where prosecutors have compared defendants to well-known criminals, courts have reversed. *See Shurn v. Delo,* 177 F.3d 662, 666-67 (8th Cir. 1999) (1999) (overturning death penalty when prosecutor continuously compared defendant to Charles Manson); *Martin v. Parker,* 11 F.3d 613, 615-16 (6th Cir. 1993) *(*granting new trial after prosecutor compared defendant to Hitler). Here, the fact that the statement came from the judge instead of the prosecutor only strengthens Parr's case.

The Government's main argument at trial was that Parr could be the "next McVeigh" in the sense that he might bomb a Federal Building based on some animosity against the Government. R. 39. The fact that the Government made this argument repeatedly throughout the trial makes the trial judge's statement harder for the jury to

dismiss and the error more obvious. *See United States v. Erickson*, 63 M.J. 504, 520 (Aff. Ct. Crim. Ap. 2006) (finding error "plain and obvious" when trial counsel compared appellant to Hitler, Saddam Hussein, bin Laden, and the Devil, inviting judge to decide case on a "solely emotional basis"); *compare United States v. Hodge*, 437 F. Supp. 2d 451 (D. Md. 2006) (denying motion for mistrial based on prosecutor's comparison to McVeigh when no reasonable jury would have confused Hodge's non-violent fraud with McVeigh's mass murder).

III. The District Court Abused its Discretion By Allowing Irrelevant and Prejudicial Evidence to Pervade the Trial.

Numerous evidentiary errors allowed the Government to try Parr essentially for being a suspicious person, rather than for making a threat on a federal building. A fair review of the transcript reveals that the bulk of the Government's evidence focused not on Parr's alleged "threat" to bomb the building, but rather on what Parr told his ex-girlfriends about Timothy McVeigh, the Unabomber, and Parr's own alleged prowess in making bombs. Before trial, Parr specifically moved to exclude any reference to Timothy McVeigh and the Unabomber, evidence from Parr's former girlfriends and neighbors about his chemical experiments and experience with pipe bombs, and expert opinions from FBI agents concerning Parr's alleged ability to build a vehicle-bomb. Parr also objected strenuously to the jury being allowed to see and take an entire copy of The Anarchist Cookbook to the jury room during deliberations. The District Court's refusal to exclude this evidence was error, and denied Parr his right to a fair trial.

a. Irrelevant evidence should be excluded, and even marginally relevant evidence must be excluded when it presents a danger of undue prejudice.

Fed. R. Evid. 402 provides that all relevant evidence is admissible, while "evidence which is not relevant is inadmissible." Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. This Court reviews a district court's evidentiary decisions for abuse of discretion. *United States v. Emenogha*, 1 F.3d 473, 477 (7th Cir. 1993).

In offering evidence of Parr's feelings about McVeigh and the Unabomber, as well as Parr's previous experiments with and statements about bombs and bomb-making, the Government alleged that this evidence was admissible under Fed. R. Evid. 404(b). Specifically, Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity".

This Court follows a 4-step analysis in determining the admissibility of Rule 404(b) material. Evidence proffered under Rule 404(b) is admissible if

> 1) it is directed toward establishing a matter other than the defendant's propensity to commit the crime, 2) the evidence was sufficient to support a jury finding that the defendant committed the similar act, 3) the other act is similar enough and close enough in time to be relevant to the matter at issue, and 4) the probative value is not substantially outweighed by the danger of prejudice.

United States v. Emenogha, 1 F.3d at 478.

Particularly in a case such as Parr's, where the allegedly threatening statements have been recorded and are not in doubt, admitting such prior bad act evidence only invites the jury to convict Parr not for his allegedly threatening statements to Schultz, but rather for what he had told his neighbors or ex-girlfriends years earlier. Because this prior act evidence was irrelevant and overly prejudicial, it should have been excluded.

b. Allowing Reference to Timothy McVeigh and the Unabomber was abuse of discretion because any probative value was substantially outweighed by the danger of prejudice.

The District Court abused its discretion and denied Parr a fair trial by admitting evidence that Parr admired Timothy McVeigh and the Unabomber. Ms. Olson, Ms. Pankhurst, Ms. Wuensch-Byrd and Agent Hammen were all allowed to testify about Parr's fascination with and admiration for Timothy McVeigh, despite Parr's repeated warnings that this evidence was irrelevant, and would create unfair prejudice against Parr if admitted. See R. 131; R. 53. Not content to simply allow mention of Parr's views of Timothy McVeigh and the Unabomber, the Government repeatedly asked witness after witness to tell the jury what Parr thought of these two men.

Ms. Olson testified that Parr spoke "quite a bit" about McVeigh, "especially around the time he was executed." Tr. 1 at 24. She said that Parr "sat watching it for hours on the t.v. Just fascinated by it." *Id*. When the Government asked if Parr was emotional during that time, Ms. Olson said that Parr "felt bad, because he thought they shouldn't have done that." *Id*. at 25. Ms. Olson also said that Parr has a nickname, "Uni," which he got "by blowing things up." *Id*.

Ms. Pankhurst testified that she heard Parr talk about McVeigh, and that Parr "thought he was a hero." *Id*. at 43. She said that he talked about the Unabomber "a lot," and "was quite impressed with the Unabomber." *Id*.

Ms. Wuensch-Byrd also testified that Parr spoke about Timothy McVeigh and the Unabomber in a "positive" way. Tr. 2 at 212. Agent Hammen testified that Parr has a tattoo, "a small round bomb with a wick," and "the letters U-N-I. Put together, Uni-bomb." Tr. 1 at 107. Schultz was also allowed to testify that Parr "wanted to be like Ted Kaczynski. And he wanted to be like Timothy McVeigh the second. He was – he really wanted to." Tr. 2 at 310.

In admitting the evidence, the District Court engaged in no detailed analysis, but simply stated that evidence related to Parr's views of Timothy McVeigh and the Unabomber were "relevant to the issue of motive." R. 135 at 28. This decision appears to have accepted the Government's argument that evidence of Parr's admiration for Timothy McVeigh and the Unabomber was probative of Parr's motive for ***wanting to blow up the building***. See R. 39; R. 183 at 5. Yet Parr's alleged desire to blow up the building was not at issue under the crime alleged in the indictment. *See Fuller*, 387 F.3d at 648.

Moreover, even if showing the jury that Parr had a motive for carrying out his alleged threat could have assisted the jury to determine whether Parr's statements could be construed as threats, admitting evidence of Parr's feelings about Timothy McVeigh and the Unabomber created a significant danger of unfair prejudice against Parr. The Oklahoma City bombing was a shocking event to people all over the United

States, as were the Unabomber's crimes. Allowing the jury to listen to witness after witness testify that Parr thought positively of McVeigh and the Unabomber carried the obvious danger that the jury would convict Parr, not for the alleged threats he made to his cell-mate, but because the jury perceived Parr as endorsing the horrific crimes committed by those men. *See Shurn,* 177 F.3d at 667 (finding that a prosecutor "appealed to the jurors' fears and emotions" by comparing the defendant to Charles Manson).

It is an established rule of law that even relevant evidence may and **should be** excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403; *see United States v. Shackleford*, 738 F.2d 776, 779 (7th Cir. 1984) (reversing conviction for improper admission of testimony on defendant's intent because intent was not at issue and the testimony was likely to improperly influence the jury); *United States v. Holt*, 817 F.2d 1264, 1268 (7th Cir.1987) (holding that even relevant evidence is subject to the requirements of Rule 403 that it not be unfairly prejudicial). Evidence is unfairly prejudicial when it has the capacity to "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997); *see also United States v. Denberg*, 212 F.3d 987, 944 (7th Cir. 2000) (quoting *United States v. Long*, 86 F.3d 81, 86 (7th Cir. 1996)) (holding that evidence is unfairly prejudicial when "it will induce the jury to decide the case on an improper basis, most commonly an emotional one").

In ruling the testimony admissible, the District Court noted that the September 20th taped conversation also included reference to McVeigh and Kaczynski, both admissible

as part of the context of the allegedly threatening statements. R. 135 at 28. However, those statements were different in context and tone than the ones the Government offered here. In the taped conversation, Timothy McVeigh and the Unabomber are brought up by Parr or Schultz while discussing McVeigh and Kaczynski's bomb-making techniques, **not Parr's opinion of their acts**. *See* Schultz Tr. at 76 (Schultz asking "Is that how McVeigh did it?"); *id*. at 36 (discussing Kaczynski being good at bomb-making).[2] Moreover, the fact that McVeigh or the Unabomber appear in the transcript of the September 20th conversation should not give the Government carte blanche to admit all other evidence on the subject. *See United States v. Best*, 250 F.3d 1084, 1093 (7th Cir. 2001) (ruling that even when a prior conviction for crack was admissible, it was error to admit evidence that the arresting officer saw guns in the house). Regardless of the fact that McVeigh and the Unabomber were mentioned in the taped conversation, allowing five witnesses to testify that Parr thought favorably of McVeigh was enough to make Parr a criminal in the eyes of the jury. *See Shurn,* 177 F.3d at 666-67; *Martin v. Parker,* 11 F.3d at 615-16.

c. Allowing the jury to see the entire ANARCHIST COOKBOOK was abuse of discretion because the contents were irrelevant to the crime charged and promoted juror confusion.

[2] Schultz did say to Parr at one point "you wanna be the next McVeigh of the world?" and Parr did answer "Yeah, the next McVeigh." Schultz Tr. at 101. Nevertheless, the bulk of the references to McVeigh and the Unabomber relate to Parr and Schultz's discussion of how these men committed their crimes.

The District Court abused its discretion when it admitted as evidence an entire copy of The Anarchist Cookbook and allowed an entire copy of the book to go to the jury room during deliberations.

The taking of exhibits to the jury room is a matter within the discretion of the trial court. Like evidentiary rulings, it is reviewed for abuse of discretion. *See United States v. Guy*, 924 F.2d 702, 708 (7th Cir. 1991); *United States v. Gross*, 451 F.2d 1355, 1359 (7th Cir. 1971). In evaluating whether the District Court erred in permitting exhibits to go to the jury room, this Court should weigh the probative value of the admitted evidence against the prejudicial effect of admitting it to the jury room.

In admitting the entire Anarchist Cookbook, the District Court focused on the fact that Schultz and Parr discuss the book in their recorded conversation, and found that the book "provide[s] the context within which [Parr's allegedly threatening] statements were made." Tr. 4 at 642. In at least two previous published cases, however, this Court has cautioned lower courts against wholesale admission of this very book. In *United States v. Rogers*, 270 F.3d 1076, 1081 (7th Cir. 2001), this Court held that the prosecution should have limited use of The Anarchist Cookbook at trial to those portions that were relevant to the charge of possessing an unregistered firearm. The book could not be used to suggest that "that possession of the book implied that Rogers wanted to become a sniper." *Id*. In *United States v. Holt*, 170 F.3d 698, 702 (7th Cir. 1999), this Court held that the district court erred in allowing the Government to use evidence that the defendant sold copies of the Anarchist Cookbook to demonstrate his knowledge of semi-automatic and automatic weapons. In support of that decision, this Court found

that "The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401."*Id*. at 702; *see United States v. Ellis*, 147 F.3d 1131, 1135 (9th Cir. 1998), in which the Ninth Circuit (reversing conviction based on improper admission of The Anarchist Cookbook to prove intent, creating a "grave danger" of prejudice).

The District Court further endorsed this improper use of The Anarchist Cookbook when the jury asked, and the court allowed, the entire book to go to the jury room during deliberations. Because the jury should have judged Parr's statements based on the context in which the alleged threatening statement was made, allowing the jury to see the book likely caused confusion of the issues, and prejudice. Indeed, the fact that the jury asked for the book shows that they focused not on the taped conversation, but on Parr's actual knowledge and intent -- **matters clearly not at issue** – and his extremist viewpoints, which even the District Court instructed was an **impermissible grounds for conviction.** R. 146. *See United States v. Parker*, 491 F.2d 517, 521 (8th Cir. 1973) (holding that probative value of admitted evidence must be weighed against prejudicial effect of them being admitted to the jury room); *United States v. De Hernandez*, 745 F.2d 1305**,** 1308 (10th Cir. 1984) (holding that decision allowing exhibits to go to the jury room warrants reversal if the decision caused prejudice to the defendant).

d. The District Court abused its discretion in admitting testimony that Parr had experimented with chemicals and explosives in the past, and that he often talked about blowing things up, because it was irrelevant and prejudicial.

The District Court erroneously admitted testimony from several ex-girlfriends alleging that they had seen Parr perform experiments with chemicals and explosives. This evidence was offered to show Parr's interest in and knowledge of explosives, even though the Government produced no evidence suggesting that Schultz, the only person to whom Parr made his allegedly threatening statements, was aware of these previous statements or acts, beyond what Parr discussed with Schultz in their taped conversation. *See United States v. Whitfield*, 31 F.3d 747, 749 (8th Cir. 1994) (holding that testimony was properly excluded when it was "not probative of the issue of whether a reasonable recipient, **knowing what she knew about the writer of the letters**, would have interpreted them as a threat") (emphasis added); *see also United States v. Hanna*, 293 F.3d 1080 (9th Cir. 2002).

Specifically, Ms. Olson, a former girlfriend, testified that Parr owned chemistry-related objects, such as "a lot of containers, beakers, glassware you would use like in a lab. . ." and that she saw Parr working with chemicals and explosives, including a time when Parr put something into a pan with water, resulting in "a lot of smoke, a lot of residue, and it stained objects on the ceiling purple." *Id*. at 20, 18. Ms. Olson also said that Parr told her he had constructed pipe bombs, and that Parr had taken her to a place where he told her he had set off a pipe bomb "and showed me the tree that they blew down from it." *Id*. at 23. Ms. Olson stated that Parr would read books about chemistry which she said explained "step-by-step" how to make bombs. *Id*. at 21. The District Court also allowed Ms. Olson to testify that she heard Parr say he was going to blow up a courthouse, and that she "took him seriously." Tr. 1 at 24.

Another ex-girlfriend, Ms. Pankhurst, related similar testimony concerning Parr's experiments, including that she saw Parr experimenting with chemicals, and that Parr had "black explosive powder" in the garage and "was afraid he'd get caught with it." *Id*. at 41-42. Ms. Pankhurst also testified that she saw Parr make "a dozen" pipe bombs, which he constructed in the basement of the duplex where they lived, and saw Parr set off a pipe bomb in a tree log at Rock River. *Id*. at 40.

Ms. Wuensch-Byrd, Parr's former neighbor, said that Parr showed her a farm where he claimed to have blown up pipe bombs, and that she "saw him using chemical processes". Tr. 2 at 211, 213. Specifically, he distilled his own water. *Id*. at 214. Ms. Wuensch-Byrd, testified that Parr talked with her about constructing bombs, including one time when Parr showed her a big barrel containing granules of some sort, and told her the barrel contained the materials necessary to make a bomb. *Id*. at 209-210. Ms. Wuensch-Byrd also testified that Parr "frequently talked about making bombs", and once showed her a farm where he claimed to have set off pipe bombs. *Id*. at 210- 211.

Another former neighbor, Ms. Homan, testified that she sometimes talked to Parr once or twice a day and that when she did "sometimes once or twice he'd bring it [making explosives] up." *Id*. at 220. According to Ms. Homan, Parr said "that he had enough stuff to blow up the whole neighborhood." *Id*.

Allowing this testimony was improper because it was not probative of knowledge, intent, or motive under Fed. R. Evid. 404(b). Such evidence could only have been used to show Parr's alleged propensity to make threats or talk about blowing things up, which Rule 404(b) expressly forbids. In *United States v. Jones*, 389 F.3d 753, 757-58 (7th

Cir. 2004) this Court recently clarified that in order for prior bad acts to be admissible under Rule 404(b), the Government must made a non-propensity argument, and "must affirmatively show why [the evidence] tends to show the more forward-looking fact of purpose, design, or volition to commit the new crime." Merely introducing the prior bad act, without more, can only prove propensity. *Id*.

The statements introduced here, regarding what Parr had told his ex-girlfriends and neighbors years before the alleged threats at issue, in no way suggests that Parr had a purpose, design, or volition to threaten anyone in August or September of 2004. *See United States v. Shackleford*, 738 F.2d 776, 779 (7th Cir.1984) (holding that 404(b) evidence must be similar enough and close enough in time such that "the consequential fact may be inferred from it").

The fact that Parr experimented with chemicals at his home is not relevant to his guilt and should have been excluded under Fed. R. Evid. 401. That Parr made threats during the period specified in the indictment or that those threats were true threats can in no way be inferred from any of the testimony of Parr's ex-girlfriends and former neighbors. Even if the evidence did have some marginal relevance to the issues the jury would be asked to decide, any probative value of this evidence was far outweighed by the danger of unfair prejudice and should have been excluded under Fed. R. Evid. 403.

First, with regard to relevance, many Americans probably own chemistry sets, and even take scientific interest in weapons and explosives. Such an interest surely should not imply that a person wants to hurt people or become a terrorist. *See Holt*, 170 F.3d at 702 ("The mere possession of reading material that describes a particular type of

activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401") (quoting *Guam v. Shymanovitz,* 157 F.3d 1154, 1158 (9th Cir. 1998)). Parr himself says in the conversation with Schultz that he has never hurt anyone before, and has only blown up small buildings when the owner of the building wanted him to.

The evidence should not have been used, as the Government contended, to prove knowledge, motive, intent, preparation, or plan, because the Government admittedly used this evidence to show that Parr had the knowledge, motive, intent, preparation, or plan to *actually blow up the Reuss Federal Building*, which is ***not*** the underlying crime. Proper use of Rule 404(b) evidence in this context would have to involve evidence probative of whether Parr had knowledge *that he was making a threat, or that this alleged threat would be perceived as serious*, whether Parr intented *to threaten someone*, whether Parr had a motive *for making threats*, had prepared *to make a threat*, or planned *to make a threat*. *See United States v. Jones*, 389 F.3d 753, 757 (7th Cir. 2004). Accordingly, these contentions do not speak to the crime alleged in the indictment – that between August 17 and September 20 Parr made threats against the Federal Building.

Even if this evidence was relevant, it should have been excluded because any probative value was outweighed by the danger or unfair prejudice. *See Holt*, 817 F.2d 1268. This testimony was prejudicial because it gave the distinct impression that Parr was performing the experiments to prepare for a terrorist attack. It also suggested that Parr was obsessed with bomb-making and had crazy ideas about blowing up the neighborhood. *See* Tr. 2 at 208-211; *id*. at 220. Indeed, the Government actually admitted

to the District Court that it wished to introduce this evidence in order to show the jury that Parr was capable of following through on his alleged threat. R. 183 at 5-6. The admission of this evidence, in addition to the Government's attempt to draw improper inferences from that evidence, created a substantial danger of unfair prejudice to Parr. *See, e.g., Yumich v. Cotter*, 452 F.2d 59, 65 (7th Cir. 1991) (holding that the "emphasis on revolting conduct [while marginally relevant] deprived plaintiffs of a fair trial of the real issue of the case"). The fact that Parr's neighbors believed his comments and were scared of him once again highlighted for the jury the unproven **possibility** that Parr would eventually do something violent. These types of inferences, drawn explicitly by the Government, are impermissible and unfairly prejudicial in a trial that purports to be about whether Parr made a threatening statement to a cell-mate in August or September of 2004.

In addition, admitting the evidence of Parr's previous experiments was improper under Rule 403 because it confused the jury about what was relevant to Parr's guilt. This testimony was presented at the beginning of trial, before any other Government witnesses and before the jury had heard the tape of Schultz's jailhouse conversation with Parr. By focusing the jury immediately on Parr's dangerous, but not illegal pastimes, this testimony unfairly prejudiced the jury again Parr.

e. Expert opinion that Parr understood the principles involved in bomb-making and was capable of building a vehicle-bomb with practice should have been excluded.

The District Court allowed Agent Daniel Hickey to testify over Parr's objections as an expert witness concerning the explosives technology that Parr and Schultz discussed in their conversation. Agent Hickey, an FBI explosives expert, analyzed for the jury the various chemical formulations and methods which Parr described for Schultz during the recording. Agent Hickey listed several mistakes Parr made during his discussion of explosives, but then testified that it was his "opinion that Parr is capable, after some practice, of assembling a vehicle bomb that would be capable of creating property damage, death, and possibly death to his intended target, which is the Federal Building." Tr. 3 at 362.

Agent Hickey also testified that Parr "understands the concept of a detonator" and that despite getting information about a booster wrong, that "[o]nce again, he understands the concept." *Id*. at 370. Agent Hikcey speculatively opined that Parr was capable of making a large bomb despite his errors because "review of literature, anarchist literature, or even conventional literature would show the steps." *Id*. at 364.

Under Fed. R. Evid. 702, expert testimony is admissible when it will "assist the trier of fact to understand the evidence, or determine a fact in issue." Fed. R. Evid. 702. Admission of this testimony was abuse of discretion, because the evidence was speculative, irrelevant, overly prejudicial, and invaded the province of the jury. First, the testimony was irrelevant because the capability to follow through with a threat was not an element of the crime.

In *United States v. Fuller*, 387 F.3d 643, 648 (7th Cir. 2004), this Court held that a psychiatrist was properly excluded from testifying that defendant never actually

intended to follow through with his threats on the President, because the defendant's subjective intent was irrelevant to a legal determination of guilt. Because this Court follows an objective standard for judging true threats, "the jury's opinion as to whether a reasonable person would foresee that the statement would be interpreted as a serious expression" was the only opinion that mattered. *Id*. This Court found that "Burdening the jury with testimony about why Fuller might have sent the letter, when such information is not relevant to the question of legal guilt, would merely have been confusing to the jury." *Id*. Agent Hickey's testimony should have been excluded because, like subjective intent, Parr's capability to bomb the building is not relevant to the determination of Parr's guilt. Including this testimony could only serve to confuse the jury about the important facts.

Expert testimony should also be excluded when it is too speculative to be helpful. *See United States v. West*, 670 F.2d 675, 683 (7th Cir. 1982) (testimony about whether it would be possible for prisoner's visiting wife to have sex with him in jail was too speculative and properly excluded). Agent Hickey's testimony that Parr would be capable of producing a vehicle-bomb "after some practice" was speculative and unhelpful on its face, as anyone with the necessary time, intelligence, and resources could build a bomb "after practice."

Even if Agent Hickey's testimony was relevant, it should have been excluded as prejudicial under Fed. R. Evid. 403. Agent Hickey's testimony prejudiced the defendant in two ways: 1) it exposed the jury to an expert's understanding of Parr and Schultz's conversation, which inevitably skewed the juror's perspective on the entire question of

whether the statement was a true threat; and 2) by telling the jury that Parr could build a bomb with practice, the Government focused the jury on what Parr may do, or could do, rather than the crime he was charged with.

The Supreme Court has noted that: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). By presenting Agent Hickey to the jury as an expert witness, any improper affect his testimony had on the jury was multiplied.

Under the objective standard for judging true threat, it is essentially the jury's job to stand in the room where the conversation is being held, and judge whether Parr's comments can be considered true threats. This determination involves assessing the reasonable person's plausible interpretation of the comments within the context of the statements, and a determination that a reasonable person "should have foreseen" that his statements would be taken seriously. *Khorrami*, 895 F.2d at 1193. Agent Hickey should not have been allowed to give any opinion interpreting the defendant's comments, because hearing the testimony prevented the jury from judging the statements based on the objective "reasonable speaker" standard. Whether an FBI agent or an explosives expert takes Parr's understanding of chemistry seriously is something entirely different from the question of whether Parr should reasonably have foreseen that his cell-mate Schultz would take these comments seriously.

The testimony was also prejudicial because the entire effect of the testimony was to focus on Parr as a person who may someday in the future blow up buildings. It gave the distinct impression that Parr is close to doing so. Suggesting that Parr is close to building a vehicle-bomb begs the jury to convict Parr for being a terrorist, rather than someone who made a threat. Allowing such testimony focused the trial on what Parr might do, or could do, rather than what he actually did.

IV. The Cumulative Effect of the District Court's Evidentiary Errors, along with the District Court's Specific Reference to Parr as "Mr. McVeigh," deprived Parr of his Right to a Fair Trial.

In cases where multiple errors have been shown, this Court considers not only the effect of each individual error, but also considers the cumulative effect of such errors on the verdict. "Cumulative errors, while individually harmless, when taken together can prejudice a defendant as much as a single reversible error and violate a defendant's right to due process of law." *Taylor v. Kentucky*, 436 U.S. 478, 487 (1978). Cumulative error occurs when two or more errors were committed at trial, and when "the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial." *United States v. Allen*, 269 F.3d 842 (7th Cir. 2001).

By bringing in numerous pieces of evidence that Parr admired Timothy McVeigh, had an interest in and experience with chemicals, and talked about bomb-making, the Government prejudiced and confused the jury about what was really at issue in this case. The cumulative effect of this evidence was so confusing and prejudicial that even the trial judge, on the very first day, became confused and called Parr "Mr. McVeigh."

Combining this error with the numerous other errors at trial, leaves a definite and firm conviction that Parr was deprived of a fundamentally fair trial. *Allen*, 269 F.3d 842.

Parr's trial should have focused on the issue of whether *in the context and under the circumstances of the statement,* Parr should reasonably have foreseen that Schultz would take his statements about bombing Reuss Plaza to be serious. Instead, the government continually tried to draw a connection between Parr actually intending to blow up the Federal Building, and Parr's statements being a true threat. R. 183 at 4-5, 15-19. This connection has been rejected again and again in case law. *See Khorrami,* 895 F.2d at 1193; *Hoffman*, 806 F.2d at 707. The overall effect of these errors and the District Court's allowance of evidence in furtherance of such a connection was to focus trial on Parr as a dangerous person rather than whether Parr made true threats.

V. The District Court Erred in Applying Sentencing Enhancements for Obstruction of Justice and Involving a Crime of Terrorism.

At sentencing, the District Court enhanced Parr's offense level by two for obstruction of justice under § 3C1.1. The District Court further enhanced 12 levels under U.S.S.G. § 3A1.4 because Parr's offense allegedly "involved a crime of terrorism", and in accord with 3A1.4, bumped Parr's criminal history from 4 to 6. Accordingly, the recommended sentence as calculated by the District Court was 360 months to life.

Because neither enhancement was warranted in this case, Parr's sentence should be reversed and his case remanded for rehearing. [3]

a. The District Court failed to make adequate findings to support a perjury enhancement.

The District Court improperly applied the enhancement for obstruction of justice in the form of perjury, because the District Court erred in finding that Parr perjured himself at trial.

According to Guideline 3C1.1, the district court can adjust the defendant's offense level upward by two levels if the defendant willfully obstructed or impeded the administration of justice. U.S.S.G. § 3C1.1. This enhancement is properly applied when a defendant perjures himself. *United States v. Dunnigan*, 507 U.S. 87 (1993). However, if a defendant objects to the sentencing enhancement, the district court must review the evidence and make independent findings necessary to establish perjury as defined in the federal perjury statute at 18 U.S.C. § 1621. *Dunnigan*, 507 U.S. at 95 (1993). The district court's determination that perjury was committed is sufficient if it encompasses "all the factual predicates for a finding of perjury." *Id*. The adequacy of the district court's conclusions under *Dunnigan* are reviewed *de novo*, and its factual findings for clear error. *United States v. Carroll*, 412 F.3d 787, 793 (7th Cir. 2005).

A witness commits perjury under the federal perjury statute if he "gives false testimony concerning a material matter with the willful intent to provide false

[3] Without either enhancement, Parr's recommended range would have been 77-96 months, based on the original offense level of 24 and Parr's category 4 criminal history. This sentence falls below the 120 months that Parr actually received even with the District Court's departure.

testimony, rather than as a result of confusion, mistake, or faulty memory." *Id*. Here, the District Court found that Parr committed perjury by willfully misrepresenting what occurred during his post-arrest interview with Agent Hammen. Specifically, the District Court found that Parr lied when he responded as follows to cross-examination by Unites States Attorney Biskupic:

> Mr. Biskupic: How about any time? Did you convey to any agent of the Federal Bureau of Investigation that the conversations regarding a wearing of the disguise, the specifics about the Reuss Building, that you had said those, but that you didn't mean them?
>
> Parr: The beginning of the conversation, I said it wasn't real; I didn't mean it. It wasn't real.

Tr. 3 at 533. See R. 187 at 19.

The District Court understood Parr's response to this question as an assertion that Parr had told Agent Hammen during the post-arrest interview that he had made the statements, but that he had also told Agent Hammen that it was all a joke, an assertion which Agent Hammen specifically denied. R. 187 at 20. However, a review of this entire line of questioning from the Government reveals that the District Court took Parr's statement out of context and misunderstood what Parr was saying. A fair reading of the surrounding statements shows that Parr was trying to convey that he did not really intend to blow up the building and that he wanted to communicate to Agent Hammen that "this was not real." See Tr. 3 at 532-33. When asked directly if he ever told the F.B.I. that he had talked about urea bombs, but that it was just make believe, Parr

answered "I don't remember. I don't remember if we got to that point." *Id*. at 533. *See Dunnigan*, 507 U.S. at 94 (finding that perjury does not include false testimony that is the "result of confusion, mistake, or faulty memory").

Parr testified that he admitted having a conversation about bomb-making to Agent Hammen, but that he told Agent Hammen that he did not intend to blow up the building. Tr. 3 at 532.Agent Hammen actually corroborated this testimony in cross-examination. In fact, Parr never denied that he lied to Agent Hammen during the interview. *Id*. at 530. He very clearly testified that after he became scared and "lawyered up", that he denied everything. *Id*. Agent Hammen earlier testified that when he asked Parr about specific details contained in the conversation, such as wearing a disguise, getting a name tag and a truck, that Parr denied making those statements. Tr. 1 at 105. Parr did not contradict this testimony; he only differentiated between the beginning of the interview, when he thought Hammen would find out it was all a mistake, and the end, when he denied everything. *See* Tr. 3 at 532-33. Parr specifically stated that by the time Agent Hammen asked him about the details of the conversation he had already begun to deny everything. *Id*. at 532. In the beginning of the conversation, however, it was Parr's intent for Hammen to know that he did not intend to blow up the building. *Id*.

The evidence presented both at trial and during sentencing was insufficient to show that Parr willfully lied about what occurred during the post-arrest interview. The District Court's findings that Parr willfully perjured himself were in clear error.

b. The District Court erred in holding that Parr's case "involve[d] a crime of terrorism" within the meaning of guideline 3A1.4.

U.S.S.G. § 3A1.4 allows the district court to enhance a defendant's offense level by 12 points, or up to level 32 (whichever is greater) if the offense was a felony that involved a "federal crime of terrorism" as defined in 18 U.S.C. § 2332b(g)(5). The guideline also provides that a defendant convicted of such an offense will be moved up to a criminal history of six. A "federal crime of terrorism" is one that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" and is a violation of one of the listed statutes, § 2332a included. 18 U.S.C. § 2332b(g)(5); *see also United States v. Leahy*, 169 F.3d 433, 438-39 (7th Cir.1999) (remanding for resentencing when the evidence did not show that defendant engaged in act of terrorism as defined by § 2332b).

Parr's offense did not qualify as a federal crime of terrorism as defined in § 2332b, because, as the District Court found, his offense was not "calculated to influence or affect the conduct of government by intimidation." R. 187 at 31. This case is not like most true threat cases where someone calls a government building and claims to have planted a bomb. Because Parr did not purposely communicate his threat to anyone in the Federal Government, his offense can in no way be said to "involve" an attempt to intimidate or coerce the government.

However, the District Court found that Parr's offense "involved" a crime of terrorism because actually bombing a building would be a crime of terrorism. *Id*. at 32. The District Court used the word "involves" as the operative term and gave the word

an admittedly broad interpretation. *Id*. at 32. However, in light of the precise definition of "federal crime of terrorism", the District Court erred in interpreting the word "involves" so broadly. This Court recently addressed the question of the meaning and breadth of the word "involves" in *Boim v. Quranic Literacy Inst*., 291 F.3d 1000 (7th Cir. 2002). *Boim* came to the conclusion that "involving a crime of terrorism" under the statute at issue required knowledge and intent to further the terrorist organization's violent acts. *Id*. at 1011. *See also United States v. Hammoud*, 381 F.3d 316, 356 (6th Cir.2004) (holding 3A1.4 applicable if evidence establishes that the defendant supported a terrorist organization with the intent to influence or coerce government conduct).

Because the Sentencing Guidelines use not only the term "involves" but also the broader term "relates to," one can reasonably infer that "involves" does not encompass the broadest possible relationship. *See* U.S.S.G. § 1B1.8; U.S.S.G. § 5F1.4.

Because Parr was not convicted of a federal crime of terrorism as defined by 3A1.4, nor were his actions calculated to affect the government through intimidation or coercion, the District Court improperly applied the 12 level enhancement, and the enhancement of Parr's criminal history. Had the District Court correctly calculated the recommended Guideline range, Parr's recommended sentence would be 77 to 96 months, significantly below the 120 month sentence he received even after the District Court determined that his case did not fit within the "heartland" of the Guidelines.

Resentencing is required when the guidelines are incorrectly applied. *See United States v. Hawk*, 434 F.3d 959, 963 (7th Cir. 2006)**;** *United States v. Rodriguez-Alvarez*, 425

F.3d 1041 (7th Cir. 2005). Accordingly, Parr's sentence should be reversed and his case remanded for resentencing.

VI. *Cunningham v. California*, __ U.S. __, 127 S. Ct. 856 (2007), makes clear that Parr's sentence violates his Sixth Amendment right to a jury trial.

In *Cunningham v. California*, ___U.S. ___, 127 S. Ct. 856, 863-64 (2007) the Supreme Court held California's determinate sentencing law unconstitutional because it "expose[d] . . . defendant[s] to a greater potential sentence" based on facts not found by a jury beyond a reasonable doubt. Although the California Supreme Court interpreted the California statute as essentially permitting judges to exercise discretion in sentencing, equivalent to the reasonableness review established for federal sentences in *United States v. Booker*, 543 U.S. 220 (2005), Justice Ginsburg, writing for a six-member majority, disagreed, noting that the California scheme "does not resemble the advisory system the *Booker* court ***had in view***." *Id.* at 870 (emphasis added). The majority opinion explicitly noted that Justice Alito's dissent, alleging that the California scheme was "indistinguishable" from the post-*Booker* advisory Guideline regime, *id.* at * (Alito, J., dissenting), was "[g]rounded in a notion of how federal reasonableness review operates in practice," and noted that the Court would address the actual workings of post-*Booker* sentencing in two other cases this term, *Rita v.United States*, No. 06-5754, and *Claiborne v. United States*, No. 06-5618. *Id.* at 870 n.15. This distinction, carefully made by the *Cunningham* majority, signals clearly that the Court is concerned about the constitutionality of post-*Booker* sentencing, particularly in Circuits such as this one,

where Guideline sentences are accorded a "presumption of reasonableness" on appeal. *See Rita, supra* (raising the issue of whether *Booker* permits sentences within the advisory Guidelines to be accorded a presumption of reasonableness).

Because neither of the enhancements applied to Parr were based on facts found by a jury beyond a reasonable doubt, and because the factual findings in support of these enhancements did expose Parr to a greater potential sentence than one that would be authorized without such enhancements, Parr's sentence was imposed in violation of his right to trial by jury, guaranteed by the Sixth and Fourteenth Amendments, and must be reversed.

CONCLUSION

Wherefore Parr respectfully requests that his conviction be vacated and a judgment of acquittal entered. Alternatively, Parr requests that his sentence be vacated and his case remanded for resentencing.

Respectfully Submitted,

_____

Abner J. Mikva, Attorney of Record
H. Melissa Mather
Connie J. Cannon (Ill. S. Ct. Rule 711, License # 2006LS00703)
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
60620 South University Avenue
Chicago, Illinois 60637-2786
(773)702-9611
Attorneys for Defendant-Appellant

Date: February 20, 2007

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

Counsel for Appellant Steven J. Parr certifies that counsel has submitted a digital version of its brief and all contents to the court, excluding the materials required by Circuit Rule 30. Counsel certifies that the materials not included in this electronic submission are unavailable in electronic format, as contemplated by Circuit Rule 31(e)(1).

Abner J. Mikva, Attorney of Record
H. Melissa Mather
Connie J. Cannon (Ill. S. Ct. Rule 711, License # 2006LS00703)
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, IL 60637-2786
(773) 702-9611
Attorneys for Defendant-Appellant

Date: February 20, 2007

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(b)

Counsel for Appellant Steven J. Parr certifies that this brief complies with the type volume limitations of Fed. R. App. P. 32(a), as modified by Circuit Rule 32(b). This brief contains 13928 words, including footnotes, but excluding those parts of the brief exempted by Fed. R. App. P. 32(a) (7) (B) (iii), as determined by the word count feature of Microsoft Word 2003. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a) (5), as modified by Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 34(a) (6), because it has been prepared in Microsoft Word 2003 using Book Antiqua, a proportionally spaced typeface, in 12 point text for the body of the brief and 11 point text for footnotes.

Abner J. Mikva, Attorney of Record
H. Melissa Mather
Connie J. Cannon (Ill. S. Ct. Rule 711, License # 2006LS00703)
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, IL 60637-2786
(773) 702-9611
Attorneys for Defendant-Appellant

Date: February 20, 2007

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on February 20, 2007, two copies of the Brief and Required Short Appendix of Defendant-Appellant Steven J. Parr, as well as a digital version containing the brief and the Separate Appendix, were delivered by Federal Express to counsel for Plaintiff-Appellee United States, at the following address:

Steven M. Biskupic

Office of the United States Attorney

517 E. Wisconsin Ave – Rm 530

Milwaukee, WI 53202

_____

Craig Futterman

Date: February 20, 2007

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

Pursuant to Circuit Rule 30(d), counsel for Defendant-Steven J. Parr, certifies that the following appendix includes all materials required by Circuit Rule 30(a). Pursuant to Circuit Rule 30(b)(7), Defendant-Appellant has included a separate appendix containing the material required under Circuit Rule 30(b).

_____

Abner J. Mikva, Attorney of Record
H. Melissa Mather
Connie J. Cannon (Ill. S. Ct. Rule 711, License # 2006LS00703)
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
60620 South University Avenue
Chicago, Illinois 60637-2786
(773) 702-9611
Attorneys for Defendant-Appellant

Date: February 20, 2007

ATTACHED REQUIRED SHORT APPENDIX

Table of Contents